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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Nutrition Distribution LLC,

10 Plaintiff,

11 v.

12 Black Diamond Supplements LLC, et al.,

13 Defendants.  
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No. CV-17-01869-PHX-JAT

**ORDER**

15 Pending before the Court is Plaintiff Nutrition Distribution LLC's Motion for  
16 Leave to Conduct Discovery on Damages Issues, (the "Motion," Doc. 14). The Motion  
17 also encompasses a Request for Judicial Notice, (the "Request," *id.* at 6 n.1). The Court  
18 now rules on the Motion and Request.

19 **I. BACKGROUND**

20 On June 16, 2017,<sup>1</sup> Plaintiff filed its Complaint against Defendants Black  
21 Diamond Supplements LLC and Supplement Fusion LLC asserting one claim for relief of  
22 False Advertising in Violation of Section 43(a)(1)(B) of the Lanham Act. (*See* Doc. 1);  
23 *see also* 15 U.S.C. § 1125(a)(1)(B) (2012). On June 21, 2017, Plaintiff completed service  
24 of process on both Defendants. (*See* Docs. 10, 11). After Plaintiff filed an application for  
25 entry of default, the Clerk of the Court entered default as to both Defendants on August 7,  
26 2017. (Doc. 13).

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28 <sup>1</sup> Plaintiff puzzlingly asserts that it filed its Complaint on April 12, 2017. (Doc. 14 at 3).

## II. REQUEST FOR JUDICIAL NOTICE

Plaintiff requests the Court take judicial notice of three court orders. (Doc. 14 at 6 n.1). These orders include the following: (1) Order Authorizing Plaintiff to Obtain Discovery, *Nutrition Distribution LLC v. Icon Supplements, LLC*, CV-16-03572-PHX-JJT (D. Ariz. Mar. 8, 2017); (2) Order Authorizing Plaintiff to Conduct Discovery to Ascertain Damages in Support of Anticipated Motion for Default, *Nutrition Distribution LLC v. DuraCap Labs LLC*, CV-16-00460-PHX-GMS (D. Ariz. Sept. 12, 2016); and (3) Order Authorizing Plaintiff to Conduct Discovery to Ascertain Damages in Support of Anticipated Motion for Default, *Nutrition Distribution LLC v. Nutraclipse, Inc.*, CV-17-01087-PHX-SPL (D. Ariz. Aug. 9, 2017). (See Docs. 14-2; 14-3; 14-4).

A court may take judicial notice of information “not subject to reasonable dispute because it (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determine from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). “A court shall take judicial notice if requested by a party and supplied with the necessary information.” *Id.* at 201(d). Here, because prior court proceedings are proper subjects of judicial notice, *see Ramirez v. Medtronic Inc.*, 961 F. Supp. 2d 977, 983 (D. Ariz. 2013), the Court will grant Plaintiff’s request to take judicial notice of the three court orders.

## III. MOTION TO CONDUCT DISCOVERY

Plaintiff moves, “pursuant to Federal Rules of Civil Procedure [“Federal Rules”] 26(d)(1) and 55(b)(2),” for the Court “to grant leave to Plaintiff to conduct discovery on the issue of damages after entry of default against [the Defendants].” (Doc. 14 at 2). In particular, Plaintiff “intends to seek discovery on the online payment gateway services such as PayPal used by Defendants, as well as any institutions with which Defendants hold financial accounts, in order to ascertain Defendants’ revenue from its sales of falsely advertised products.” (Doc. 14 at 6–7).

“The Federal Rules of Civil Procedure distinguish between parties and non-parties

1 in establishing available discovery devices.” *Jules Jordan Video, Inc. v. 144942 Canada*  
2 *Inc.*, 617 F.3d 1146, 1158 (9th Cir. 2010); *see also In re Liu*, 282 B.R. 904, 908–09  
3 (Bankr. C.D. Cal. 2002) (describing the different discovery tools available for use against  
4 parties versus non-parties to the litigation). Although the Federal Rules do not specify the  
5 mechanisms available to a plaintiff to take discovery of a defaulting defendant, the Ninth  
6 Circuit Court of Appeals (the “Ninth Circuit”) has held that “a defaulted defendant  
7 should be treated as a non-party.” *Jules Jordan*, 617 F.3d at 1159.

8 Here, it is not entirely clear whether Plaintiff seeks the Court’s leave to utilize  
9 discovery mechanisms that are only available to conduct discovery of a party. Because  
10 Ninth Circuit precedent is clear that the Court may not treat Defendants as “parties” for  
11 the purposes of complying with discovery obligations, the Court will construe Plaintiff’s  
12 Motion as simply requesting leave to obtain discovery through Federal Rules applicable  
13 to non-parties.<sup>2</sup> *See, e.g., W. Metal Indus. Pension Tr. v. Ruthford’s Auto Rebuild, Ltd.*,  
14 No. C06-525P, 2006 U.S. Dist. LEXIS 74274, at \*4 (W.D. Wash. Oct. 12, 2006)  
15 (denying a motion to compel pursuant to Federal Rule 37 against a defaulting defendant  
16 but allowing a plaintiff to utilize Federal Rule 45 for discovery of a defaulting  
17 defendant).

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26 <sup>2</sup> The Court notes that this interpretation is consistent with the types of discovery  
27 Plaintiff detailed in its request. (*See* Doc. 14 at 6–7). Further, to the extent Plaintiff seeks  
28 to utilize discovery mechanisms provided in the Federal Rules solely for discovery of  
parties, Plaintiff has not provided any argument that this Court can disregard Ninth  
Circuit precedent on the issue.

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